were eligible for direct intake under one of the categories provided thereunder. The appropriate category was T2.

As for *Thambipillai's* case we do not see how that decision could support the appellants' contention. In that case the learned Judge had regard to the nature and effect of that particular service circular when he held that the service circular was no more than a mere declaration of policy. The same cannot clearly be said of Service Circular 10 of 1971.

Paragraph 1 of the Service Circular reinforced by paragraphs 127 and 128 shows that the new terms and conditions of service as set out in the Circular supersede those rules and regulations which would cease to have effect and that steps were being taken to cancel and amend the relevant laws, circulars, orders and instructions to bring them in conformity with the terms of this circular.

The only remaining point raised by the appellants is that they should first be placed on UTS and then be allowed to opt to the salary scale under the Aziz Scheme. We are in sympathy with the appellants and we fully appreciate the anomaly they alleged has arisen, particularly where it affects the total emoluments compared to those who a year earlier were placed on UTS and later converted to the Aziz salary scale. This is something that does not come within the purview of the Judge to deal with. The Judge quite rightly confined himself to the appellants' claim as disclosed from the pleadings.

Moreover, we do not see how the appellants could on one hand claim that Circular 10/1971 is not applicable to them and on the other sought to be placed, or at any rate, to be allowed to opt into the Aziz scale.

For the above reasons, it is our judgment that the learned Judge had not erred in law and in fact in arriving at his decision. We ourselves have reached the same conclusion although for somewhat different reasons.

Accordingly we would dismiss this appeal with costs.

Appeal dismissed.

Solicitors: *A. Gomez & Co.*

RE DATO BENTARA LUAR DECD. HAJI YAHYA BIN YUSOF & ANOR. v. HASSAN BIN OTHMAN & ANOR.

[F.C. (Raja Azlan Shah C.J., Salleh Abas F.J. and Abdoolcader J.) July 9 and August 14, 1982]

[Kuala Lumpur – Federal Court Civil Appeal No. 146 of 1981]

Islamic Law – Wakaf – Wakaf in favour of children and their issue – Whether valid – Dedication for religious purposes – Johore Wakaf Prohibition Act, 1911, ss. 3, 4 & 5 – Johore Administration of Islamic Law Enactment, 1978, s. 48.

Legal History – What was the law applicable in Johore in 1909 – Islamic Law in force – Fatwa of Mufti – Johore Courts Enactment, 1911 – Johore Courts Enactment, 1931 – Civil Law Enactment, 1937 – Civil Law (Extension) Ordinance, 1951.

English Law – When introduced into Johore – Johore Courts Enactment, 1911, ss. 28, 29 and 30 – Johore Courts Enactment, 1931, s. 74 – Civil Law Enactment 1937 – Civil Law (Extension) Ordinance 1951.

In 1909 the late Dato Bentara Luar of Johore, Mohamed Salleh bin Perang, made a wakaf of a piece of land in favour of his two children Othman and Kalthom, and their issue forever. He died in 1915. At the time of his death the land was registered in his name. The appellants, the administrators *de bonis non* of the estate of the said Dato Bentara Luar claimed that the said wakaf was invalid and inoperative. The respondents, the children of the beneficiaries of the wakaf, claimed that the said wakaf was valid and counterclaimed for a declaration to that effect and for a vesting order of the land. Abdul Razak J. held that the wakaf was valid by virtue of the provisions of section 11 of the Wakaf Prohibition Enactment, 1911 and section 41 of the Administration of Islamic Law Enactment, 1978 – See [1981] 2 M.L.J. 352. The appellants appealed.

Held: (1) the law applicable to determine the validity of the wakaf in this case is the Islamic Law as interpreted by Muslim scholars learned in Islamic jurisprudence, unencumbered by the rule against perpetuity, a concept alien to that system of jurisprudence;

(2) the Privy Council decisions on wakaf do not apply because (i) the system of appeals to the Privy Council from the decisions of the courts in Johore was only introduced in 1920, (ii) at the time when the wakaf was created the law as interpreted by the Privy Council decisions was not yet part of the law of Johore and (iii) the application of the rule against perpetuity ever since it was introduced in the Malay States including Johore in 1937 has always been excepted by a saving clause to exclude disposals of Muslim properties according to Islamic Law from the operation of the rule;

(3) as the wakaf took effect immediately, the subsequent conduct of the Dato Bentara Luar did not disprove the existence of the wakaf nor did it affect its validity;

(4) the wakaf in this case was valid according to the Islamic Law applicable to Johore in 1919.

Cases referred to:

(1) *Mohamed Ahsanulla Chowdhry* v. *Amarchand Kundu* (1889) 17 I.A. 28; I.L.R. 17 Cal. 498.
(2) *Abul Fata Mohamed Ishak* v. *Russomoy Dhur Chowdhry* [1894] 22 I.A. 76, I.L.R. 22 Cal. 619.
(3) *Mighell* v. *Sultan of Johore* [1894] 1 Q.B. 149.
(4) *Commissioner for Religious Affairs, Trengganu & Ors.* v. *Tengku Mariam and Anor.* [1969] 1 M.L.J. 110, [1970] 1 M.L.J. 222.
(5) *Haji Embong bin Ibrahim & Ors.* v. *Tengku Nik Maimunah & Anor.* [1980] 1 M.L.J. 286.
(6) *Ismail Haji Arat* v. *Umar Abdulla & Anor.* A.I.R. 1942 Bom. 155.
(7) *Fazlul Rabbi* v. *State of West Bengal* A.I.R. 1965 S.C. 1722, 1727.
(8) *Mohamed Ismail* v. *Sabir Ali* A.I.R. 1962 S.C. 1722.
(9) *Saadat Kamel* v. *A.G. Palestine* A.I.R. 1939 P.C. 185, 188.
(10) *Bikani Mia* v. *Shuk Lal Poddar* (1893) I.L.R. 20 Cal. 116.

FEDERAL COURT.

Thara Singh Sidhu for the appellants.

Ng Kong Yeam for the respondents.

Cur. Adv. Vult.

Salleh Abas F.J. (delivering the Judgment of the Court): A certain Mohamed Salleh bin Perang also known as Dato Bentara Luar, a Johore resident, died in 1915 leaving amongst his property a piece of land, Lot 883 Grant No. 1072 situated in Johore Bahru town. The appellants are the administrators *de bonis non* of the Dato's estate whilst the respondents are the offspring of two of the Dato's children, namely Othman and Kalthom, the Dato having nine children altogether. The appellants as administrators sought to sell the land and distribute the proceeds amongst the beneficiaries of the Dato's estate. They have in fact been sued by a third party, who had entered into a sale agreement with their predecessors in title. The sale could not take place because the respondents have caveated the land on the ground that they were entitled to it by virtue of a wakaf deed executed by the Dato on May 20, 1909 in favour of their descendants and themselves. The appellants' application to remove the caveat having been dismissed by Syed Othman J. on the ground that the question of the land's title should first be resolved, they then sued the respondents claiming, *inter alia*, a declaration that the wakaf was invalid. The trial took place before Abdul Razak J. on December 6, 1980 and in a reserved judgment delivered on July 11, 1981 he held that the wakaf was valid. Hence this appeal.

Before us counsel for the appellants submitted that the wakaf was not valid on two grounds. In the first place the wakaf was wholly for the benefit of some of the descendants of the wakif (person creating the wakaf) only and in view of the Privy Council's famous decisions in *Mohamed Ahsanulla Chowdhry* v. *Amarchand Kundu*[1], and in *Abul Fata Mohamed Ishak* v. *Russomoy Dhur Chowdhry*[2] the wakaf was invalid. In the second place the wakaf was not valid because by having the land registered in his name right to this day and by dealing and managing the land as his own the wakif never allowed the wakaf to take effect, nor did he intend that it should have any effect whatsoever.

Counsel for the respondent on the other hand submitted that a wakaf to one's children and descendants is valid under Muslim law as applied in Johore and that the decision of the Privy Council in *Abul Fata's* case has no application to this wakaf, because of Johore's Wakaf Prohibition Enactment, 1911 which came into force on November 15, 1911.

In order to deal with these conflicting submissions it is necessary for us first to examine the scope and effect of the 1911 Enactment, and secondly to determine whether the Privy Council's decisions are applicable to this wakaf and thirdly whether the subsequent conduct of the Dato' had any effect at all on the wakaf.

(i) *Scope and Effect of the Wakaf Prohibition Enactment, 1911:*

In *Mohamed Ahsanullah Chowdhry's* case *(supra)* the Privy Council held that a wakaf for the benefits of the wakif's family, children and descendants and for charity would only be valid if there is a substantial dedication of the property to charitable uses at some period of time or other and in *Abul Fata's* case *(supra)* it held that in any case such wakaf would not be valid if the primary object is for the aggrandisement of the wakif's family and the gift to charity is illusory because of its small amount or its uncertainty or remoteness of object. These decisions, as we all know, provoked angry reactions and protests in India with the result that the Indian legislature had to pass in 1913 a wakaf validity Act known as Mussalman Waqf Validating Act VI of 1913 and in 1930 an amendment Act to give retrospective effect to the 1913 Act.

Using these historical developments in the wakaf law in India, counsel for the respondent sub-

mitted that the Wakaf Prohibition Enactment 1911, like the Mussalman Waqf Validating Act 1913 of India, was passed by the Johore legislature, which was then His Highness in Council, in order to neutralise the decisions of the Privy Council in those two cases cited or in other related cases.

This submission was apparently accepted by the learned trial judge who adverted to it in his judgment as follows:

"One must necessarily assume therefore that in passing the said Enactment (1911) the Johore legislature was aware of the then prior state of wakaf law governing it with particular reference to the Privy Council decisions herein before stated. Thus ..... the necessary construction and implication must be that the Johore legislature in passing the said Enactment had effected merely to overcome the prohibitions imposed by the Privy Council decisions ....."

With respect we do not agree. In our view such assumption and conclusion are not capable of being borne out by historical facts and the scope and effect of the Enactment.

(a) *Historical setting:*

In 1911 when the Enactment was passed, Johore State was still a very much independent State internally. Her relationship with the British Government was governed by the 1885 Treaty signed by Frederick Arthur Stanley, the then Colonial Secretary, on behalf of Queen Victoria as Queen of the United Kingdom of Great Britain and Ireland and Empress of India and Sultan Abu Bakar as the Maharajah of Johore. Under Articles V and VI of the Treaty, provisions were made for the defence and external affairs of Johore to be in the hands of the British Government and apart from these Articles the Sultan was free to administer the State according to his wisdom, although Article III provided for the stationing of a British Officer as Agent for the British Government. As the functions of this officer were only "similar to those of a Consular Officer", the Sultan was completely on his own in matters affecting the general administration of the State. It was not until 1914 when Article III of the 1885 Treaty was amended to provide for the residence of a British Officer to be called the British General Adviser, whose advice "must be asked and acted upon on all matters affecting the general administration of the country and on all questions other than those touching Malay Religion and Custom". (*Maxwell & Gibson* "Treaties and Engagements Affecting Malay States (1924)" pp. 115-142; see also *Hickling* "An Introduction to the Federal Constitution 1960" published by F.M. Information Services, p. 4).

Thus Johore was the last Malay State to accept British protection. In 1911 when the Enactment was passed by the State legislature (His Highness the Sultan in Council), the highest court in the State was also the Court of His Highness the Sultan in Council to serve as the "Final Court of Appeal in all matters civil and criminal" (sections 2 and 6 of Johore Courts Enactment No. II of 1911, in force on May 3, 1911). The laws to be applied by the courts in Johore then were those laid down in sections 28, 29 and 30 of the Courts Enactment 1911 and these were:—

"ORDINANCES ADOPTED

28. (1) The Penal Code of the Straits Settlements, and the Evidence Ordinance of the Straits Settlements are hereby adopted as law for the State of Johore.

(2) Nothing in this section contained shall affect the Court of a Kathi or Assistant Kathi.

CONTRACT AND TORT.

29. (1) In hearing actions and suits concerning contract or for wrongs independent of contract, the courts shall be guided by the principles of the English Law of Contracts and the English Law of Torts so far as such principles are applied by the Courts of the Straits Settlements.

(2) Nothing in this section contained shall affect the Court of a Kathi or Assistant Kathi.

SUCCESSION AND INHERITANCE.

30. (1) As regards estates of deceased Muhammadans the law of succession and inheritance shall be the Muhammadan law of succession and inheritance.

(2) As regards estates of deceased persons other than Muhammadans the law of succession and inheritance shall be the law applied in similar cases in the Colony of the Straits Settlements."

Although the Courts Enactment was amended and repealed several times by subsequent enactments in order to provide for the better and more effective organisation of courts and for the reception of English level system, only in 1920 did the Johore legislature provide for appeals to the Privy Council from the decisions of the Johore Court of Appeal (Section 33 of the Courts Enactment No. 17 of 1920). Thus it is too far-fetched for anyone to regard that the Wakaf Prohibition Enactment 1911 was passed by the State of Johore in order to avoid the effect of the decision of the Privy Council when the State herself was just beginning to provide an infrastructure, so to speak, to receive English law and by virtue of the 1885 and 1914

treaties and the Courts Enactment the questions relating to Muhammadan Law and Malay custom were expressly excluded from the application of the received English law. Section 30 (1) of the Courts Enactment 1911 for example clearly enacted that "As regards estates of deceased Muhammadans the law of succession and inheritance shall be the Muhammadan law of succession and inheritance".

It is also unthinkable that in 1911 His Highness the Sultan in Council was informed of the development of the wakaf law in India and thus became so concerned that the 1911 Enactment had to be passed in order to mount a rescue operation for the existing wakafs. This is pure conjecture without any basis at all. For certain, His Highness the Sultan in Council could not have been informed, least of all advised, because the British Officer stationed in Johore at the time was only performing consular functions, i.e. functions relating to the protection of British nationals and British interests in the State.

(b) *The Enactment itself:*

The Wakaf Prohibition Enactment, 1911 is described by the learned trial judge as "a short but comprehensive piece of legislation". It remained in the Johore Statute book for almost 68 years until February 16, 1979 when it was finally repealed by the Administration of Islamic Law Enactment, 1978. In our view it is not correct just to refer to section 4 of the 1911 Enactment without reading sections 3 and 5 together with it. We reproduce these three sections below:

"3. After the commencement of this Enactment every attempt to deal with land, whether by declaring it to be tanah wakaf or otherwise, whereby the right of alienation attached to the same is sought to be in any manner permanently restricted or destroyed shall be null and void and of none effect.

4. If at any time prior to the commencement of this Enactment, any land shall have been declared to be tanah wakaf, other than for some public or charitable purpose, the ownership thereof shall, as from the commencement of this Enactment, be deemed to vest exclusively in the person or persons beneficially entitled to the rents and profits thereof, and every such person shall, to an extent proportionate to his interest in such rents and profits, be deemed to have a permanent, transmissible and transferable right in such land.

5. (i) Any person claiming to be the owner or part owner of any land by virtue of the preceding sections may at any time apply to the court for an order that any register, book or journal kept at any Land Office or Registry of Deeds or Titles shall be rectified, or that any entry shall be made or interpolated in any such register, book or journal, or that any entry therein shall be cancelled.

(ii) Upon such application being made the court shall cause notice thereof to be served, in the same manner as a summons in a civil suit, upon any person who may appear likely to be affected thereby and such notice shall specify the time and place at which the application will be considered.

(iii) When the application is considered the court shall hear every person who appears before it and claims to be affected by the application, and thereafter shall make such order as justice may require."

These three sections together constitute the whole legislative scheme introduced by the Enactment. The mischief aimed at by it was the practice of dealing with lands having the effect of permanently restricting or destroying the right of alienation or right of disposal or transfer attached to the ownership of lands. It was with the view of prohibiting this practice that the Enactment was passed. Wakafs were included amongst the dealings aimed at by the Enactment because the ownership of the wakaf lands could no longer be transferred or transmitted to any one. Thus under section 3 with effect from the commencement of the Enactment, i.e. November 15, 1911, any such dealing whether it was a wakaf or not was prohibited and if entered into would have no legal effect at all. But section 4 preserved private wakaf lands, which were created prior to that date and under this section their ownership was deemed to be vested in their beneficiaries, by whom the lands would be transmissible and transferable. Thus while section 3 prevented the freezing of ownership of the lands, section 4 unfroze the ownership, which had previously been frozen. From the date on which the Enactment was in force land ownership was no longer capable of being untransmissible and untransferable. Section 5 is a consequential provision upon section 4 in that a beneficiary of a private wakaf was entitled to have his name recorded in the books of the land office by making the necessary application to the court for rectification of the book.

The effect of this Enactment in providing for the transferability and transmissibility of land ownership is certainly far-reaching. Contrary to the submission of counsel for the respondent that it was to prevent a private wakaf from being invalid, the Enactment had certainly the effect of prohibiting the declaration of wakafs altogether. As from that date Muslim residents in Johore lost the freedom to declare wakafs in respect of their lands and this incapacity continued until

1979 when this Enactment was finally repealed. Section 3 is very emphatic and clear on this point.

The scheme introduced by this Enactment therefore had nothing to do with validating an invalid wakaf or even saving or preventing a valid wakaf from being invalid. Its purpose and intendment seemed to be motivated by the State policy of proscribing probably a prevalent practice of making land ownership non-transferable. This tying up of land ownership must have been considered to be detrimental to the economy and development of Johore into a modern State. Thus even the beneficiary of a wakaf was given the right to transmit the land on his death or transfer it when still alive. The Enactment, of course, did not attempt to lay down the criterion of a valid wakaf, be it a private wakaf (meaning a wakaf other than for some public or charitable purpose) or a public wakaf. Its validity or otherwise had to be decided in accordance with Muslim law and not by section 4 of the Enactment. The respondent cannot rely upon the Enactment to say that the wakaf under appeal is valid. But he could, of course, submit that the wakaf was not rendered invalid by the Enactment.

In our view the effect of this Enactment on the present wakaf is that the validity of its remained unaffected but the ownership of the wakaf land was deemed to be vested in the beneficiaries, i.e. Othman bin Mohd. Salleh and Kalthom binte Mohd. Salleh and that the ownership was transmissible to their heirs after their death or even transferable during their lifetime. They were entitled to come to court to have their names entered as owners in the records in the Land Office – a course which they did not take, but could have taken if they had so wished.

The only benefit we could derive from the Enactment is that it gave an indication that wakafs as observed and recognised to be part of the law of Johore were then of two types: a public wakaf, meaning a wakaf for some public or charitable purpose; and a private wakaf meaning a wakaf for non-public or non-charitable purpose.

(ii) *The decisions of the Privy Council:*

The wakaf under appeal was created on May 20, 1909 and the Dato' (the wakif) passed away on July 22, 1915. The wakaf deed was signed by him in the presence of two witnesses, who also signed the document. The deed is as follows:

> "Whereas I, Mohd Salleh bin Perang (Dato' Bentara Luar) while in sound state of mind and good health, have made a wakaf a piece of land with all the plants on it to my son Othman bin Mohd Salleh and his children and grandchildren and descendants for ever. The land is from a sub-division of my land Grant No. 166 dated 2nd day of Muharram, 1299 Hijrah, in Johore Bahru.
>
> The land is bounded on its west by Jalan Ngee Heng, on its north by former land of Dato' Hakim Haji Mohd Salleh, on its south by former land of Encik Abu and on its east by the left bank of upper part of Sungai Segget as clearly shown in the plan annexed to this document.
>
> As this is true and clear, I hereunder set my hand in the presence of witnesses ..... (few words in Arabic)."

As the law applicable in Johore at the time governing the estates of Muslims was the Muhammadan Law of succession and inheritance, the wakaf must inevitably fall to be decided by that law. But the matter does not end here, because another question arises as to whether the Muslim law applicable was that which was understood and interpreted by the religious authorities and scholars in Johore or that which was interpreted by the Privy Council in those two cases mentioned earlier.

Johore in 1909 when the wakaf was created was still treated by the British Government as a sovereign State: *Mighell* v. *Sultan of Johore*[3]. She was enjoying internal autonomy and some sort of the English legal system was introduced, as we have seen, only in 1912 by the Courts Enactment of that year. In 1915 when the Dato' died Johore had just accepted the stationing of a British General Adviser, whose advice, though binding on the State, did not extend to matters pertaining to Islamic law and Malay custom. We have already observed earlier that at the time the highest court in the State was the court of His Highness the Sultan in Council from which there was no further appeal to anybody. Appeal to the Privy Council was only instituted in 1920 by section 33 of the Courts Enactment No. 17 of 1920, following the lead by the Federated Malay States in 1919. It is also interesting to note that the authors of *Halsbury's* Laws of England observed on the law of the Malay States, Federated or non-Federated, as on October 1, 1933, to be as follows:

> "In the Malay States, Federated and Unfederated alike, the essential basis of the law is Malay custom and Muhammadan law, as inextricably blended, for all matters of civil rights as affecting the natives, with legislation on the basis of the law of the Straits Settlements, i.e. English law influenced by Indian law, for other matters, and for criminal

law. The same principles are followed in British North Borneo and Sarawak."

(HLE Volume 11, 2nd Edn. (1933) para 464 at pp. 246-247).

As the basic law of the State was Muslim law and the Privy Council had no jurisdiction as yet on cases decided by Johore court, we cannot see how the Muslim law as interpreted by the Council's decisions could be held to be part of the law of Johore.

This historical approach was not adopted in *Tengku Mariam's* case[4] and *Haji Embong's* case.[5] In *Haji Embong's* case – the wakaf having been created on June 13, 1961 – the approach was not necessary because appeals to the Privy Council were then already a firmly established institution. In *Tengku Mariam's* case, however, at the time when the wakaf was created, i.e. on February 22, 1941, the Trengganu Court of Appeal constituted under her Courts Enactment (Chapter 2) was the final court from which there was no further appeal. Appeals to the Privy Council were not heard of in Trengganu and this institution was only extended to Trengganu when the State joined the Federation of Malaya in 1948 in consequence of which her Courts Ordinance (Chapter 2) was repealed. The little historical sketch drawn by Suffian, F.J., as he then was, in *Tengku Mariam's* case was only meant to show how the civil courts as opposed to Syariah courts came to have jurisdiction to decide questions relating to wakafs, despite the Trengganu Administration of Islamic Law Enactment, 1955. But the point could have been taken further especially when at the time the wakaf was created the Chief Judge, who must be a Malay Judge, alone "shall have the power to decide matters relating to Muslim law". (Sections 6 and 8).

During the course of his submission, we asked counsel for the appellant to address us on the question whether section 25 of the Civil Law Act, 1956 has any effect on this wakaf. This section says:

"Nothing in this Part shall affect the disposal of any property according to Muslim law or, in Sabah and Sarawak, native law and custom."

Counsel, however, gave a rather terse reply saying that section 25 was not in force in 1909 when the wakaf was created and therefore irrelevant. With respect we disagree with this view.

It was unfortunate that this point was never raised in either the High Court or the Federal Court in *Commissioner of Religious Affairs, Trengganu & Ors.* v. *Tengku Mariam & Anor* (*supra*). In that case Wan Suleiman J., as he then was, held following the Privy Council's decisions, that a wakaf with the ultimate gift for religious purpose was void, but the Federal Court reversed the decision on the ground that although the court considered the Privy Council's decisions binding upon it, in the circumstances of the case the decisions did not apply because the parties were estopped from challenging the validity of the wakaf by their earlier agreement to submit the question for the opinion of the Mufti and to abide by it. In *Haji Embong bin Ibrahim & Ors.* v. *Tengku Nik Maimunah Hajjah & Anor (supra)* this court held that a wakaf created on June 13, 1961 was valid because of the Islamic Wakaf Validating Enactment No. 10/1972 which was passed by the Trengganu State Assembly to nullify the effect of the Privy Council's decisions. In that case we declined to follow the decision of Chagla J. in *Ismail Haji Arat* v. *Umar Abdulla & Anor*[6] and preferred to apply section 25 of our Civil Law Act because the judgment of the learned judge was still influenced by the concept of charitable trust and rules against perpetuities as developed and understood in English law. We said in *Haji Embong's* case *(supra):*

"Whereas in our case those rules should play no part at all in the disposition of property under Muslim law."

We are not alone in expressing this view. Hidayatullah J. who later became the Chief Justice of India in *Fazlul Rabbi* v. *State of West Bengal*[7] observed:

"Now it is a matter of legal history that wakfs in which the benefits to charity or religion were either illusory or postponed indefinitely, while the property so dedicated was being enjoyed from generation to generation by the family of the wakif, were regarded as opposed to the rule against perpetuities as contained in the Indian Succession and the Transfer of Property Acts. This was so declared in a succession of cases by the Judicial Committee and the opinion of Amir Ali expressed in his Tagore Lectures as well as in *Meer Mahomed Israil Khan* v. *Shasti Churn Ghose*, I.L.R.19 Cal. 412 and *Bikani Mia* v. *Shuk Lal Poddar*, I.L.R.20 Cal. 116 (FB), was not accepted."

It is therefore clear that the decisions of the Privy Council on wakaf, as explained and understood by the above quoted judgment was based on the Indian Succession and Transfer of Property Acts. Section 14 of the Indian Transfer of Property Act passed in 1882 enacted:–

"Rule against perpetuity – No transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of

such transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong."

(The A.I.R. Manual, Third Edition, Vol. 20, p. 637, at p. 709).

The Act made no exception in favour of disposition of property amongst Muslims like our section 25 of the Civil Law Act.

In *Mohamed Ismail* v. *Sabir Ali*[8] the Indian Supreme Court had occasion to consider the effect of rules against perpetuity introduced by section 12 of Oudh Estates Act 1869 on Wakf-alal-aulad, i.e. permanent dedication of the wakif's property to his family and descendants. This Act was passed by the British Government after its occupation and annexation of Oudh in 1857 following the Indian Mutiny in order to regulate titles to lands, which were surrendered to the government and subsequently regranted to new owners. Under the Act the new owners obtained absolute titles, and could transfer their lands as they pleased but by section 12 they could not do so if the transfer or bequest would infringe the rule against perpetuity. A wakaf-alal-aulad was created in August, 1925 in respect of certain regranted lands. It was held that despite the Mussalman Waqf Validating Act, 1913, the Oudh Estates Act, 1869 being a special Act to deal with lands in Oudh applied to the wakaf and therefore section 12 invalidated the wakaf. Thus the ghost of *Abul Fata's* case *(supra)* still haunted the courts in India, even though the Waqf Validating Act of 1913 was passed and the Privy Council had long since ceased to be the highest Court of Appeal for India. There was, however, one lone dissenting opinion. Sarkar J. held that the wakaf was valid and that section 12 did not apply because in the case of a wakaf there was no postponement of the gifts. The property was transferred to God Almighty the moment the wakaf was created. Surely this is the correct opinion which should commend itself to the majority.

Sarkar J.'s opinion is similar to that of Sir George Rankin who delivered the judgment of the Privy Council in an appeal from Palestine in the case of *Saadat Kamel* v. *A.G. Palestine*[9]. Speaking on the difference between a trustee in the case of a trust and a mutwalli in the case of a wakaf, he said:

... "it is necessary to bear in mind that wakf property is not vested in the mutwalli:"

Thus if the wakaf property is not vested in the mutwalli nor is it vested in the beneficiaries, it must therefore be vested in God. The vesting in Him, therefore, takes effect immediately because God is omnipresent and omnipotent. *Saadat Kamel's* case is also interesting because in that case the Privy Council reached a contrary conclusion in respect of a wakaf made in 1812 in Palestine. The Council held that the wakaf was valid and not subject to limitation period provided in the Ottoman Civil Code Acts 1660 to 1675. The judgment said:

"A wakf is not governed by rules against perpetuity, and successive future life-interests in favour of unborn persons are valid by the Mahomedan law of wakf. The special rule 'from generation to generation' has no exceptional effect to make the particular descendant whose interest accrues thereunder take by purchase and not by limitation." (p. 189)

After that digression, we now come back to our main point in that the wakaf law in India before the Mussalman Wakf Validating Act, 1913 was affected by rule against perpetuity and even after the Act there was a general inclination towards application of the rule to wakafs. Whatever the rationale underlining the law it is clear that the application of the rule in India is not subject to any exception at all, whereas in the case of our Civil Law Act, 1956 the rule which is stated in Part VII (Sections 17 to 25) is expressly excluded by section 25 in the case of the disposal of property according to Muslim law and as regards Sabah and Sarawak according to native law and custom.

Of course section 25 of the Act was non-existent in 1909 when the wakaf was made or in 1915 when the Dato' died. Its non-existence then makes no difference because the rule itself was not in existence either. As at the material time the basic law was Islamic law and the rule against perpetuity which is a concept entirely foreign to Islamic law was not yet part of the law of Johore, it follows therefore that the wakaf must be governed by Islamic law as understood and interpreted by Islamic scholars and not by decisions based on such concept.

The rule against perpetuity was introduced into the Federated Malay States only on March 12, 1937 by the passing of the F.M.S. Civil Law Enactment No. 3 of 1937. The rule was introduced in sections 7 and 7A of the Enactment but section 7B made a clear reservation that –

"The provisions of sections 7 and 7A shall not affect the disposal of any property according to Muhammadan Law."

The rule together with its saving provision also became the law of Johore by virtue of section 74 of Courts Enactment No. 1/1931 (in force on 6.5.1931). This section subsequently renumbered as section 75 of the Courts Enactment No. 54 made a blanket provision for the application of F.M.S. enactments to the State. Thus the extension of the F.M.S. Enactment No. 3/1937 to Johore on December 31, 1951 by the Civil Law (Extension Ordinance No. 49/1951) following the entry of Johore into the Federation of Malaya in 1948 was tautologous as this Enactment had been part of the law of Johore since its passing in 1937.

It is therefore clear to us that as this wakaf was made at the time when the rule against perpetuity was not even heard of in Johore it could not have been affected by such rule or law based on the rule. The validity or otherwise of this wakaf must be determined solely by reference to the Islamic law as understood, observed and interpreted by Muslim scholars trained and learned in the jurisprudence of Syariah law. Further even after the rule was introduced in the F.M.S. and Johore in 1937, the authorities in this country jealous in protecting the Islamic religion and Malay custom made a clear reservation or saving in favour of the disposal of property according to Islamic law. Thus in our view the Privy Council's decisions in the two cases cited are not applicable to this wakaf.

(iii) *Is the Wakaf valid?*

What remains to be decided now is whether according to Islamic Law this particular wakaf is valid?

Islamic Law is not law in the sense that it is passed by a human legislative body. The Administration of Islamic Law Enactment does not attempt to enact what the Islamic law on a given topic is, but merely provides a framework for an administration in order to apply the law. The law itself is either a direct command from the Quran or Hadith, i.e. the ways of the Prophet Muhamed or an interpretation of either or both these legal sources. Being God's law, Islamic law is therefore immutable. The wakaf law as it existed in 1909 when this particular wakaf was created remains the same as it is today. We have referred to the Wakaf Prohibition Enactment, 1911 in which the Johore legislature seemed to recognise two types of wakafs:

(1) Wakaf for some public or charitable purpose; and

(2) Wakaf for non-public or non-charitable purpose.

Under section 41 of the Administration of Islamic Law Enactment No. 14 of 1978, the legislature adopted more or less similar classifications, i.e. (1) Wakaf Ahli, a wakaf which benefits the descendants of the wakif (the person who creates the wakaf) and those of the beneficiaries, (2) Wakaf Am, a wakaf which benefits the public; and (3) Wakaf Khas, a wakaf which benefits a specific person or groups of persons. Wakaf Ahli and Wakaf Khas really belong to the same category as Wakaf for non-public or non-charitable purpose mentioned in the 1911 Enactment. By mentioning such wakaf in the Enactment it is obvious that Islamic law recognises such wakaf. We have also noted that even in India such wakaf is valid, but in the case of *Mohamed Ismail* v. *Sabir Ali (supra)* such a wakaf was held to be invalid because of section 12 of the Oudh Estates Act, 1869. Support for the validity of a private wakaf like the one under appeal is also found in the case of *Saadat Kamel* v. *A.G. Palestine (supra),* where it was said that a wakaf for the children and descendants of the wakif was valid. In *Bikani Mia* v. *Shuk Lal Poddar*(10) Ameer Ali, J. held that a private wakaf for one's family and children was valid. This case was of course overruled by the Privy Council in *Abul Fata's* case *(supra),* but it is relevant for our purpose because we are of the view that this wakaf should not be decided on the basis of *Abul Fata's* case. Ameer Ali, J. and other authors on Islamic law are emphatic that a private Wakaf is valid under the law. (See *S. Athar Hussain* and *S. Khalid Rashid*: Wakaf Laws and Administration in India (1968 Eastern Book Co., p. 98 and p. 115).

The Mufti of Johore in his fetwa issued sometime in 1970 stated that the wakaf is valid. Whilst we are not bound to accept his fetwa as we are entitled to expound what the Islamic law on a given topic is, we are equally not bound to reject the opinion stated in the fetwa just because Islamic law is the law of the land and the duty to expound this law falls on us. In our view as the opinion was expressed by the highest Islamic authority in the State, who had spent his lifetime in the study and interpretation of Islamic law and there being no appeal against the fetwa to His Highness the

Sultan in Executive Council under the relevant State Enactment – i.e. Enactment No. 48, now re-enacted by Enactment No. 14 of 1979 – we really have no reason to justify the rejection of the opinion, especially when we ourselves were not trained in this system of jurisprudence and moreover the opinion is not contrary to the opinions of famous authors of books on Islamic law. The fact that the fetwa is inconsistent with *Abul Fata's* case *(supra)* is immaterial because we hold that case as being inapplicable.

The wakaf property consists of Lot 883, Grant No. 1072 with an area of 4 acres Or 30p. This area is what is left of the original wakaf property. The property was formerly held under Malay Grant 166 issued to the Dato' on December 16, 1882. The area of the land was then 6 acres Or and 6p. On November 6, 1911 the land was subdivided into two lots. The first lot, Malay Grant No. 655, with an area of 5 acres 1r and 26p, was retained by the Dato', whilst the smaller lot, Malay Grant No. 656 was transferred to one Syed Sahil bin Ahmad probably pursuant to sale of the portion of the land to him. Subsequently, the wakaf property, then held under Malay Grant 655 was charged twice by the Dato' to one Toh Ah Boon, but the charges were discharged before the Dato's death. Part of the wakaf land was acquired by the Government on October 15, 1972. Thus the present lot 883 held under Malay Grant 1072 was issued to replace the Malay Grant 655. The land was never registered in any person's name other than the Dato's.

It is the contention of counsel for the appellants that as the Dato' had registered the wakaf land in his name and had sold a part of the wakaf property and even charged it twice he had no intention to make the wakaf effective, nor did he allow it to be effective.

The answer to this submission is fully dealt with in the judgment of the learned trial judge with which we agree.

Wakaf is not like a marriage which requires consummation. A valid wakaf, like the one under appeal, takes effect immediately from the moment of its creation. The ownership of the wakaf property is in law immediately vested in God Almighty. The legal requirement that the property must be registered in the name of the beneficiary or the mutawalli is only for the purpose of its administration. We cannot see anything wrong or objectionable that this wakaf land was registered in the Dato's name, and continued to be so registered, because there being no mutawalli appointed, he must be taken to assume the role of the mutawalli. Further, the subsequent subdivision of the wakaf land and the transfer of a subdivided portion of it to a third person do not in any way indicate or prove that the Dato' never intended to create the wakaf. The wakaf created by him had already taken effect. His conduct in subdividing and charging the wakaf property may appear to be inconsistent with the wakaf, but this conduct cannot disprove the existence of the wakaf or its validity, although it might well amount to breaches by the Dato' of his duties as its mutawalli. This issue is irrelevant in the present appeal because we are not called upon to decide whether the Dato' was acting against the interests of the beneficiaries or not.

Conclusion:

The wakaf is valid for the following reasons:

(1) the law applicable to determine the validity of this wakaf must be such as that interpreted by Muslim scholars learned in Islamic jurisprudence, unencumbered by rule against perpetuity, a concept alien to this system of jurisprudence;

(2) the Privy Council's decisions in *Ahsanullah's* case and *Abul Fata's* case do not apply because –

(i) the system of appeals to Privy Council from the decisions of courts in Johore was only introduced in 1920;

(ii) at the time when the wakaf was created the law as interpreted by Privy Council decisions was not yet part of the law of Johore; and

(iii) the application of the rule against perpetuity ever since it was introduced in the Malay States including Johore in 1937 has always been excepted by a saving clause to exclude disposals of Muslim properties according to Muslim law for the operation of the rule;

(3) As the wakaf took effect immediately, the subsequent conduct of the Dato' does not disprove the existence of the wakaf nor does it affect its validity.

The appeal is therefore dismissed with costs and the deposit is to be paid to the respondents against taxed costs.

Appeal dismissed.

Solicitors: *Thara Singh Sidhu; Hassan & Kong Yeam.*